(2)

No. 04-1111

Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANK GABALDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERITORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that an order be entered to rehear the previous order denying his writ of certiorari to review the judgment below.

GROUNDS FOR REHEARING

Petitioner Gabaldon presents the following brief and distinct intervening or other circumstances of a substantial and controlling effect compelling this Court to rehear the previous order denying his petition for writ of certiorari:

1. On February 14, 2005, petitioner Gabaldon filed a petition for writ of certiorari in this case.

2. The question presented in that petition for writ of certiorari was, "When the government presents no evidence that the victim was held for an appreciable period before she suffered a beating which immediately rendered her unconscious and caused her death, has the government proven the 'holding' element of a federal kidnapping charge under 18 U.S.C. § 1201(a) when it does not present any evidence the act of beating her involved any restraint beyond that inherent in her murder?"

3. On March 21, 2005, this Court denied the petition for writ of certiorari.

4. This petition for rehearing is timely, pursuant to Sup. Ct. R. 44.2, if filed on or before April 15, 2005.

5. In *United States v. Lentz*, No. 04-8107, on January 10, 2005, petitioner Lentz filed a currently pending petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit in *United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004). Question presented number II in the Lentz petition is, "When the government presents no evidence of an unlawful physical or mental restraint of the victim or that the victim was confined for an appreciable period, but instead presents circumstantial evidence from which the jury could infer that the victim, after she traveled interstate alone, was murdered, has the government proven the 'holding' element of a federal kidnaping charge under 18 U.S.C. § 1201(a) when it does not present any evidence as to whether the act of killing the victim involved any restraint beyond that inherent in the act of killing her?".

6. The question presented by petitioner Gabaldon and question presented number II by petitioner Lentz present the same legal issue for review by this Court.

7. This Court has yet to enter an order either granting or denying petitioner Lentz's petition for writ of certiorari.

8. If this Court grants petitioner Lentz's petition for writ of certiorari and orders question presented number II of Lentz's petition for writ of certiorari be reviewed, this Court should rehear its previous denial of petitioner Gabaldon's petition for writ of certiorari.

9. Both petitioners Lentz and Gabaldon asserted that a reason to grant each petition for writ of certiorari was the significant circuit split on the essential "holding" element of the Federal Kidnapping Act, 18 U.S.C. § 1201(a).

10. The Solicitor General declined to file a response to Gabaldon's petition. Although Lentz's petition preceded Gabaldon's, the Solicitor General declined to file a response in Gabaldon, obtained an extension to respond to Lentz's petition, and filed a response on March 14. After this Court denied Gabaldon's petition on March 21, Lentz's petition was then distributed on March 24 for the Court's conference of April 15. This sequence of events effectively deemphasized the important fact that two contemporaneously pending petitions contained the identical legal issue.

11. If this Court orders that question presented number II of the Lentz petition for writ of certiorari be reviewed, that intervening circumstance will have the substantial and controlling effect of perpetuating the significant circuit split and stifling the uniformity of application of federal law if petitioner Gabaldon's petition for writ of certiorari containing the same question presented remains denied. This petition for rehearing relies on the intervening circumstances involved with Lentz's petition, and is filed to preserve the possibility that the two cases can be consolidated to consider the same legal issue under the test articulated in *Government of Virgin Islands v. Berry*, 604 F.2d 221 (3d Cir. 1979) in light of the unique circumstances in each case.

CONCLUSION

For the reasons given above, the previously filed petition for a writ of certiorari should be reheard and granted.

Respectfully submitted,

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April 8, 2005

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

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